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No. 76-1015

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOHN HUGHETT, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1976. The petition for a writ of certiorari was filed on January 24, 1977, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court's instructions to the jury constituted plain error.

2. Whether the evidence was sufficient to sustain the convictions of petitioners Thomas Hughett and John Hughett, Jr.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner Thomas Hughett was convicted of willfully conducting an illegal gambling business, in violation of 18 U.S.C. 1955. Petitioner Ward Hughett was convicted of willful failure to pay the special tax imposed on retail liquor dealers, in violation of 26 U.S.C. 5121(2). Each was sentenced to two years' imprisonment. Petitioner John Hughett, Jr., was convicted of both of the above offenses and was sentenced to concurrent two-year prison terms on each count. The court of appeals affirmed (Pet. App. A).

The evidence at trial showed that, in the latter part of 1973, petitioners Thomas Hughett and John Hughett, Jr., conducted an illegal gambling business at a place known as the Green Parrot in Middlesboro, Kentucky. It also showed that petitioners John Hughett, Jr. and Ward Hughett made retail sales of liquor in the back room of the Green Parrot and that neither paid the special tax imposed on retail liquor dealers.

ARGUMENT

1. In its instructions to the jury concerning criminal intent, the district court stated in part (Pet. App. 25):

> As a general rule, it is reasonable to infer that a person ordinarily intends all the natural and probable consequences of acts knowingly done or knowingly omitted. So, unless the evidence in the case leads the jury to a different or contrary conclusion, the jury may draw the inference and find that the accused intended all the natural and probable consequences which one, standing in like circumstances and possessing like knowledge, should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

Although petitioners excepted to certain portions of the charge, they did not object to the above instruction (Pet. App. 30-31). Petitioners contended on appeal, however, that the instruction was plain error. The court of appeals, relying on earlier cases in the circuit, found that the challenged instruction should not have been given, but it concluded, in light of the instructions as a whole and the proof of guilt, that the error did not affect any substantial rights of the petitioners. Further review of this essentially factual determination is not warranted.

Contrary to petitioners' assertion (Pet. 6), there is no conflict between the decision below and decisions of the Fifth and Ninth Circuits. Although those courts have held that use of the instruction at issue here was plain error (see *Mann* v. *United States*, 319 F. 2d 404 (C.A. 5), certiorari denied, 375 U.S. 986; *Bloch* v. *United States*, 221 F. 2d 786 (C.A. 9)), those decisions were based upon their particular facts. Subsequent decisions in each circuit have upheld convictions despite use of the challenged instruction, where, as here, the charge when read as a whole and in the context of the trial clearly placed the burden of proof of criminal intent on the government. See, *e.g.*, *United States* v. *Duke*, 527 F. 2d 386, 393 (C.A. 5), certiorari denied, 426 U.S. 952; *United States* v. *Durham*, 512 F. 2d 1281, 1288-1289 (C.A. 5), certiorari denied, 423 U.S. 871; *United States* v. *Jenkins*, 442 F. 2d 429, 438 (C.A. 5); *Cohen* v. *United States*, 378 F. 2d 751, 755-756 (C.A. 9), certiorari denied. 389 U.S. 897; *Sherwin* v. *United States*, 320 F. 2d 137, 148-150 (C.A. 9), certiorari denied, 375 U.S. 964. Moreover, all three circuits are in agreement that the charge is erroneous and should not be given by the district courts in their jurisdictions. In sum, there is no conflict on this issue, and the determination whether use of the instruction in

a particular case constitutes plain or reversible error is appropriately left to the courts of appeals.[1]

2. Petitioners Thomas Hughett and John Hughett, Jr. contend (Pet. 8-10) that the evidence was insufficient to sustain their convictions under 18 U.S.C. 1955 because the involvement of five or more persons in the illegal gambling enterprise was not established. The evidence showed, however, that petitioner John Hughett, Jr. sold tip boards, assisted in operating the card games, and cut the pot on behalf of the gambling enterprise; petitioner Thomas Hughett supervised the activities in the back room (where the gambling operation was located) and was a part owner of the establishment (Tr. 665); Selda Sue Blackburn and Bonnie Hughett played "lookout" roles by operating a warning light that signalled persons in the back room in the event police entered the building (Tr. 708-710); and an unidentified male worked behind the bar and was responsible for "pushing" the tip boards. This evidence was sufficient to support the convictions. See *United States* v. *Tarter*, 522 F. 2d 520 (C.A. 6); *United States* v. *Thomas*, 508

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[1]In *United States* v. *Chiantese*, 546 F. 2d 135, the Fifth Circuit has recently ruled that use of the so-called "*Mann* instruction" henceforth will require an automatic reversal of the conviction, at least when the defendant has objected to the instruction at trial (*id.* at 136 and n. 3). However, in a case decided two days before *Chiantese*, another panel of the Fifth Circuit viewed the trial judge's overall charge to the jury, the type of case, and the nature of the evidence in concluding that use of the "*Mann* instruction" did not constitute reversible error. *United States* v. *Roberts*, 546 F. 2d 596, 598-599. The government has petitioned for rehearing, with suggestion of rehearing *en banc*, in *Chiantese* in an effort to resolve this intra-circuit conflict. In these circumstances, there is no necessity for review of the question by this Court. *Chiantese*, even if ultimately adhered to by the Fifth Circuit, does not in any event conflict with the decision below, since it requires automatic reversal only when a timely objection has been made at trial to the instruction.

F. 2d 1200 (C.A. 8), certiorari denied *sub nom. Schullo* v. *United States*, 421 U.S. 947; *United States* v. *Harris*, 460 F. 2d 1041 (C.A. 5), certiorari denied, 409 U.S. 877.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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